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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 3266

TOM'S EXPRESS, INC., AND RED STAR TRANSIT COMPANY, INC.,

Plaintiffs,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO,

Defendant

STATEMENT AS TO JURISDICTION

Statutory Provisions Sustaining Jurisdiction

This appeal is from a final decree and order of the Three-Judge Court convened in the Southern District of Ohio, Eastern Division, in accordance with the provisions of U. S. Code, Title 28, Sections 2281 and 2284, by which said Court upheld the validity of a statute of the State of Ohio, dissolved and terminated a temporary restraining order theretofore issued, and denied the petitions of plaintiffs for an order permanently restraining and enjoining the operation, execution, and enforcement of said statute in so far as it applies or purports to apply to vehicles used by plaintiffs, upon and over the highways of the State of Ohio, in their

operations as motor carriers (as defined in U. S. Code, Title 49, Section 303) under the jurisdiction and regulation of the Interstate Commerce Commission as set forth in U. S. Code, Title 49, Sections 301-328.

The Supreme Court of the United States has jurisdiction upon direct appeal to review said final decree and order by virtue of U. S. Code, Title 28, Section 1253 which provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required to be heard and determined by a district court of three judges."

Cases Believed to Sustain Jurisdiction

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are *Clark* v. *Poor*, 274 U. S. 554, *Query* v. *United States*, 316 U. S. 486, and *Toomer* v. *Witsell*, 334 U. S. 385, *South Carolina* v. *Barnwell*, 303 U. S. 177.

State Statute—the Validity of Which Is Involved

The state statute, the validity of which is at issue in this appeal, is Section 7250-3, General Code of Ohio, which provides as follows:

> "No person shall drive or operate or cause to be driven or operated, any commercial car, trailer or semi-trailer, used for the transportation of goods or property, the gross weight of which, with load, exceeds three tons, upon the public highways, streets, bridges and culverts within the state of Ohio or any subdivision thereof, unless such vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles to prevent as far as practicable such wheels from throwing dirt, water or other materials on the

windshields of following vehicles; such protectors or flaps shall have a ground clearance of not more than one-fifth of the distance from the center of the rearmost axle to the center of the flaps under any conditions of loading of the motor vehicle, shall be at least as wide as the tires they are protecting; provided, however, that if the motor vehicle is so designed and constructed that the above requirements are accomplished by means of fenders, body construction or other means of enclosure, then no such protectors or flaps shall be required; and further provided that rear wheels not covered at the top by fenders, bodies or other parts of the vehicle shall be covered at the top by protective means extending at least to the center line of the rearmost axle.

"Any person found guilty of a violation of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five dollars."

Date of Decree and Order to Be Reviewed and Date of Presentation of Petition for Appeal

The decree and order of the Three-Judge Court convened in the Southern District of Ohio, Eastern Division, from which this appeal is taken, was made and entered on February 20, 1952.

Plaintiffs' petition for appeal was this day, March 21, 1952, presented to the District Court of the United States for the Southern District of Ohio, Eastern Division.

Nature of the Case and Substantial Nature of Questions Involved

This action is one to restrain and enjoin the operation and execution of Section 7250-3, General Code of Ohio, hereinbefore set forth, and to restrain and enjoin its enforcement by the Division of State Highway Patrol, Department of Highways, State of Ohio, in so far as the provisions of said

statute apply or purport to apply to vehicles used, exclusively in interstate commerce, upon and over the highways, streets, bridges, and culverts within the State of Ohio by a motor carrier (as defined in U. S. Code, Title 49, Section 303) operating under the jurisdiction and regulation of the Interstate Commerce Commission, as set forth in U. S. Code, Title 49, Sections 301-328.

Each plaintiff in this action is a corporation; is a "motor carrier" as defined in Section 203(a)(16) of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 303); is a "common carrier by motor vehicle" as defined in Section 203(a)(14) of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 303); and operates, as such, exclusively in interstate commerce upon and over the public highways, streets, bridges, and culverts within the State of Ohio, and upon and over the highways of other states, under a certificate of public convenience and necessity issued by the Interstate Commerce Commission as provided in Sections 206 and 207 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 306 and 307).

Defendant in this action, the Division of State Highway Patrol, is the enforcement agency of the Department of Highways, State of Ohio, vested with the authority and charged with the duty, by virtue of Sections 1183 and 1183-2, General Code of Ohio, of enforcing the provisions of the statute at issue, as well as the provisions of other statutes relating to the operation and use of vehicles upon and over the highways of said state.

Each plaintiff, in the conduct of its motor-carrier business, operates upon and over the highways, streets, bridges, and culverts within the State of Ohio, exclusively in interstate commerce, vehicles of the type subjected by the State of Ohio, through its General Assembly, to the requirements of Section 7250-3, General Code of Ohio. Said vehicles are

presently subjected to, and are equipped in accordance with, regulations of the Interstate Commerce Commission, issued and made effective by said commission under authority of Sections 201-228 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 301-328, particularly Section 304) which prescribe, among other things, the equipment, parts, and accessories to be attached to vehicles operated under the jurisdiction of said commission (Motor Carrier Safety Regulations, Revised, Ex Parte MC-2, MC-3, MC-4, and MC-13). The aforesaid regulations of the Interstate Commerce Commission do not presently require that there be attached to vehicles operated by a motor carrier the metal protectors or flexible flaps provided for by the provisions of Section 7250-3, General Code of Ohio.

Each plaintiff offered testimony before the Three-Judge Court, predicated upon the invalidity of the Ohio statute, that the arrests threatened and contemplated by defendant, through its superintendent and highway patrolmen, if not prevented, would (a) disrupt, and destroy its investment in, its transportation business, (b) jeopardize its interstate certificate which provides that failure to render reasonably continuous and adequate service to the public, in pursuance of the authority contained therein, shall constitute sufficient grounds for the suspension, change, or revocation thereof, (c) interfere with the normal movement of interstate shipments, within the scope of its interstate operating authority, offered to it for transportation upon and over the highways, streets, bridges, and culverts within the State of Ohio, (d) divert business from it to such interstate competitors as might submit to the requirements of Section 7250-3, General Code of Ohio, and (e) compel it to terminate its use of the highways of the State of Ohio or, in the alternative, to defend itself in a multiplicity of cases instituted by de-

fendant to enforce the provisions of Section 7250-3, General Code of Ohio.

The provisions of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 301-328), as related to this action, are these:

"Section 202. (U. S. Code, Title 49, Section 302)

(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, *and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.*

(b) Nothing in this part shall be construed to affect the *powers of taxation* of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the *power of regulation of intrastate commerce* by motor carriers on the highways thereof.

• • • • • • •

"Section 203. (U. S. Code, Title 49, Section 303)

(a) As used in this part—

• • • • • • •

(19) The *"services"* and *"transportation"* to which this part applies include all *vehicles* operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, *together with all facilities and property* operated or controlled by any such carrier or carriers and *used in the transportation of passengers or property* in interstate or foreign commerce *or in the performance of any service* in connection therewith.

"Section 204. (U. S. Code, Title 49, Section 304)

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may *establish reasonable requirements with respect to* continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and *safety of operation and equipment.*

* * * * * * *

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and *equipment of motor vehicles* as provided in this part; * * *.

The Ohio statute at issue is one pertaining to safety equipment of motor vehicles—the subject dealt with in the Motor Carrier Safety Regulations (Ex Parte MC-2, MC-3, MC-4, and MC-13) prescribed by the Interstate Commerce Commission under Section 204 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 304). The statute is not one pertaining to "sizes and weight" of vehicles as contemplated in Section 226 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 325) which provides as follows:

"The Commission is hereby authorized to *investigate and report* on the need for Federal regulation of the *sizes and weight* of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; * * *"

Each plaintiff contends that the requirement of the Ohio statute is invalid as applied to vehicles which it uses, exclusively in interstate commerce, under the jurisdiction of the Interstate Commerce Commission—vehicles fully equipped with the parts, accessories, and devices prescribed in the aforesaid safety-equipment regulations of the Interstate Commerce Commission.

Each plaintiff contends that when Congress occupied the safety-equipment field of legislation, the diversity of the state requirements then constituted a serious interference with the transportation of shipments by motor carriers across state lines, and that the legislative history of Section 204 of Part II of the Interstate Commerce Act (U. S. Code, Title 47, Section 304) discloses that the principal objective of Congress was to formulate (through the Interstate Commerce Commission) a set of safety-equipment regulations of uniform and nationwide application to put to an end the operating hardships caused by the then-prevailing diversity of the state statutes. Support for such contention is found in *The Congressional Record-Senate,* Volume 79, Part 5, Pages 5735-5737, Seventy-Fourth Congress, for April 16, 1935; the underlying reports of the *Interstate Commerce Commission* in 178 I. C. C. 539 (582, 583) and 182 I. C. C. 263-430; the *Report of Federal Coordinator of Transportation,* Senate Document No. 152, Seventy-third Congress, Second Session; and the *Report of Committee on Interstate Commerce, United States Senate,* Seventy-fourth Congress, First Session, with respect to S. 1629.

Each plaintiff contends that the Interstate Commerce Commission, by virtue of Section 204 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 304), was given, and now possesses, the sole power to prescribe the parts, accessories, devices, and appliances to be attached to vehicles operated by a motor carrier, exclusively in interstate commerce, and that the safety-equipment

regulations of the Interstate Commerce Commission (Motor Carrier Safety Regulations) operate to bar the states from that field of regulatory legislation.

Each plaintiff contends that the states are without power to legislate in the field of interstate commerce for the purpose of supplementing the set of safety-equipment regulations prescribed by the Interstate Commerce Commission, for the reason that such power was deliberately and expressly taken from the states by Congress, effective upon the adoption of the Motor Carrier Safety Regulations by the Interstate Commerce Commission under the provisions of Section 204, of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 304).

Each plaintiff contends, finally, that the General Assembly of the State of Ohio exceeded its power in this instance, and that Section 7250-3, General Code of Ohio, as it applies or purports to apply to vehicles used in its motor-carrier business, exclusively in interstate commerce, under the jurisdiction of the Interstate Commerce Commission, is invalid and repugnant to the Constitution of the United States (Article I, Section 8, and Article VI) and the Acts of Congress (U. S. Code, Title 49, Sections 301-328).

Defendant in this action contends that the requirement of the Ohio statute at issue represents a proper exercise of the state's police power—a power which it claims was not affected by Part II of the Interstate Commerce Act (U. S. Code Title 49, Sections 301-328) or the adoption of regulations thereunder by the Interstate Commerce Commission.

The issue in this action, therefore, is this: Whether or not the Motor Carrier Safety Regulations of the Interstate Commerce Commission operate to invalidate the requirement contained in Section 7250-3, General Code of Ohio, as applied to vehicles operated by a motor carrier, exclusively in interstate commerce, under the jurisdiction of the Interstate Commerce Commission.

In passing upon said issue, the Three-Judge Court found for defendant, and, in an exceptionally precise manner, based its decree and order of February 20, 1952 upon the authority of two cases: *Atlantic Coast Line Railroad Company* v. *State of Georgia*, 234 U. S. 280, and *Kelly* v. *State of Washington*, 302 U. S. 1.

The memorandum which was filed by the Three-Judge Court with its decree and order contains the following findings and conclusion which are the basis for this appeal:

• • • • • • •

"3. That weather conditions in the State of Ohio cause Ohio roads to be wet and dirty for a substantial portion of each year.

"4. That no legislation by Congress or regulations of the Interstate Commerce Commission requires motor carriers travelling in interstate commerce through the State of Ohio to make any provisions to prevent rear wheels of their vehicles from throwing dirt, water or other material on the windshields of the following vehicles.

• • • • • • •

"3. That Section 7250-3 of the General Code of Ohio is a valid exercise of the police power by the State of Ohio. This Act does not conflict with or overlap any Act of the Congress of the United States or any regulation of the Interstate Commerce Commission. The federal government has not preempted the field of motor carrier regulations in connection with mud guards."

The decree and memorandum of the Three-Judge Court, made and entered on February 20, 1952, is appended hereto.

In basing its decree and order upon the two cases cited, the Three-Judge Court rejected the proposition that Congress intended, when it enacted the Motor Carrier Act, 1935 (Senate Bill 1629), now Part II of the Interstate Commerce

Act, as amended, that there be nationwide uniformity with respect to the equipment of motor vehicles operated in interstate commerce by motor carriers.

With the matter of "uniformity" in mind, the case of *Atlantic Coast Line Railroad Company* v. *State of Georgia*, 234 U. S. 280, is not decisive of the issue raised in this appeal because, in that case, Congress had not empowered the Interstate Commerce Commission to adopt a *set* of regulations to replace the diverse regulations of the states. The authority which the Interstate Commerce Commission then had as to headlights and other appliances not specifically provided for in the Acts of Congress was to "investigate and report"—the type of restricted authority it now has with respect to "sizes and weight" of vehicles operated by motor carriers (Section 226, Part II of the Interstate Commerce Act — U. S. Code, Title 49, Section 325).

It is respectfully urged, also, that the case of *Kelly* v. *State of Washington*, 302 U. S. 1, is not decisive because the state statute at issue in said case was one requiring "inspection;" it was not a statute requiring the installation of an appliance or accessory of the type required by the Ohio statute at issue in this appeal. Even in that case, the Supreme Court of the United States cautioned that the need for uniformity of regulation is a decisive consideration in every case, and that whether or not "the State in a particular matter goes too far must be left to be determined when the precise question arises."

In this appeal, it can be shown the Supreme Court of the United States that Congress, very deliberately and expressly, rejected the proposition (advocated by the state commissions at the time it considered the legislation in question) that the power of the Interstate Commerce Commission with respect to safety devices and appliances should be shared with the states. It can be shown, also, that Con-

gress decided, over the objection of the states, that the lack of uniformity of safety-equipment requirements called for its exclusive occupancy of that legislative field.

It can be shown, also, that the reasoning in the following cases, among others, supports the position taken by these plaintiffs: *Napier* v. *Atlantic Coast Line Railroad Company; Chicago & Northwestern Railroad Company* v. *Railroad Commission of Wisconsin, and Chicago, Milwaukee & St. Paul Railway Company* v. *Railroad Commission of Wisconsin,* 272 U. S. 605; *Charleston & Western Carolina Railway Company* v. *Varnville Furniture Company,* 237 U. S. 597-604; *Adams Express Company* v. *Croninger,* 226 U. S. 491-513; *Southern Railway Company* v. *Reid,* 222 U. S. 424-444; *Southern Railway Company* v. *Railroad Commission of Indiana,* 236 U. S. 439; *Pennsylvania Railroad* v. *Public Service Commission,* 250 U. S. 566; *Welch* v. *New Hampshire,* 306 U. S. 79; *Maurer* v. *Hamilton,* 309 U. S. 598; *Missouri Pac. R. Co.* v. *Porter,* 273 U. S. 341, and *California* v. *Zook and Craig,* 69 Sup. Ct. 841.

The last-cited case, *California* v. *Zook and Craig,* was decided on April 25, 1949, and it is taken as representing the current thinking of the Supreme Court of the United States. While there was a difference of opinion in said case as to the precise matter then under consideration, there was accord with respect to the necessity of applying differently-based reasoning to legislation enacted for the purpose of displacing variegated state requirements with a set of uniform standards.

The question raised by this appeal is of a substantial nature in that the decree and order of the Three-Judge Court, made and entered on February 20, 1952, may be taken by the State of Ohio and by other states as license to revive their prior policy and program of independent action in the field of legislation pertaining to devices, appliances,

and equipment of vehicles operated by motor carriers in interstate commerce, thus nullifying Congressional intent and precluding the formulation of a set of regulations and standards of nationwide application, and creating, once again, the interference and hardships caused by diverse and variegated statutes of the forty-eight states.

Facing the prospect of being subjected to a great number of statutes of like kind, enacted in Ohio and in other states, the matter at issue in this case has nationwide implications, and it is of the greatest importance to these plaintiffs and to the entire motor-carrier industry that the Supreme Court of the United States review the decree and order of the Three-Judge Court from which this appeal is taken.

Respectfully submitted,

(S.) TAYLOR C. BURNESON,

(S.) J. E. SIMPSON,

Attorneys for Plaintiffs.

March 21, 1952.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Filed Feb. 20, 1952 Howard E. Parker, Clerk

Civil Action No. 3266

TOM'S EXPRESS, INC., Weirton, West Virginia, *Plaintiff*,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO, Columbus, Ohio, *Defendant*

DECREE

Allen, Circuit Judge; Underwood and Druffel, District Judges

This cause came on to be heard on the merits, on the pleadings, the evidence, and the briefs and arguments of counsel. The Court, upon consideration thereof, and upon authority of Atlantic Coast Line Railroad Company v. State of Georgia, 234 U. S. 280, and Kelly, Director, et al. v. Washington ex rel. Foss Co., 302 U. S. 1, finds in favor of the defendant and against the plaintiff.

Wherefore, it is hereby ordered, adjudged and decreed:

(1) That the defendant's motion to dismiss be, and it hereby is overruled, to which ruling defendant excepts.

(2) That plaintiff's prayer for a permanent injunction be, and it hereby is denied, to which plaintiff excepts.

(3) That the temporary restraining order heretofore granted herein be, and it hereby is dissolved and terminated, to which plaintiff excepts.

(4) That the complaint herein be, and it hereby is dismissed, on the merits, at plaintiff's costs, to which plaintiff excepts. Findings of Fact and Conclusions of Law are attached hereto.

(S.) FLORENCE E. ALLEN
(S.) MELL G. UNDERWOOD
(S.) JOHN H. DRUFFEL

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Filed Feb. 20, 1952 Howard E. Parker, Clerk

Civil No. 3266

TOM'S EXPRESS, INC., *Plaintiff*,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO, *Defendant*

MEMORANDUM

This is an action wherein plaintiff seeks an adjudication that Section 7250-3 of the General Code of Ohio, which section requires that freight trailers and commercial cars weighing three tons or more be equipped with metal protectors or flexible flaps on the rear-most wheels, be declared invalid, unconstitutional and inoperative and that its enforcement be enjoined as it applies or purports to apply to vehicles operated by the plaintiff exclusively in interstate commerce.

The District Court issued a temporary restraining order enjoining the enforcement of Section 2750-3 of the General Code of Ohio. On November 30, 1951 a three-judge court was convened in accordance with provisions of Title 28, Section 2284, U. S. Code. At the opening of the hearing on that date Red Star Transit Company, Inc. was permitted to intervene as a party-plaintiff.

The Court having carefully considered the evidence and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. That Section 7250-3 of the General Code of Ohio provides:

> "No person shall drive or operate or cause to be driven or operated, any commercial car, trailer or semi-trailer, used for the transportation of goods or property, the gross weight of which, with load, exceeds three tons, upon the public highways, streets, bridges, and culverts within the state of Ohio or any subdivision thereof, unless such vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles to prevent as far as practicable such wheels from throwing dirt, water or other materials on the windshields of following vehicles; such protectors or flaps shall have a ground clearance of not more than one-fifth of the distance from the center of the rear-most axle to the center of the flaps under any conditions of loading of the motor vehicle, shall be at least as wide as the tires they are protecting; provided, however, that if the motor vehicle is so designed and constructed that the above requirements are accomplished by means of fenders, body construction or other means of enclosure, then no such protectors or flaps shall be required; and further provided that rear wheels not covered at the top by fenders, bodies or other parts of the vehicle shall be covered at the top by protective means extending at least to the center line of the rear-most axle.
>
> "Any person found guilty of a violation of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five dollars."

2. That compliance with Section 7250-3, of the General Code of Ohio for trucks used exclusively in interstate commerce would cost the plaintiff trucking companies more than Three Thousand Dollars each.

3. That weather conditions in the State of Ohio cause Ohio roads to be wet and dirty for a substantial portion of each year.

4. That no legislation by Congress or regulations of the Interstate Commerce Commission requires motor carriers travelling in interstate commerce through the State of Ohio to make any provisions to prevent rear wheels of their vehicles from throwing dirt, water or other material on the windshields of the following vehicles.

5. That plaintiffs by this action are seeking to have a statute of the State of Ohio declared invalid, unconstitutional and inoperative as it applies to vehicles operated by them exclusively in interstate commerce.

CONCLUSIONS OF LAW

1. That the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and arises under the constitution and laws of the United States.

2. This Court has jurisdiction of the parties and the subject matter of this action.

3. That Section 7250-3 of the General Code of Ohio is a valid exercise of the police power by the State of Ohio. This Act does not conflict with or overlap any Act of the Congress of the United States or any regulation of the Interstate Commerce Commission. The federal government has not preempted the field of motor carrier regulations in connection with mud guards.

4. That the temporary restraining order issued herein should be dissolved and the action dismissed at plaintiffs' cost.

Entry accordingly.

(S.) FLORENCE E. ALLEN,
Judge, United States Court of Appeals;
(S.) MELL G. UNDERWOOD,
Judge, United States District Court;
(S.) JOHN H. DRUFFEL,
Judge, United States District Court.